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Evidence

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I. Introduction

The principal developments and trends to be noted in the law of evidence appeared this year in appellate Court decisions. The legislative changes were few. Only one legislative change seems likely to be of any significance and will be felt primarily by drivers accused of being under the influence of intoxicating liquor. For lawyers, the notable developments appear in the case law; it is likely that the courts will remain the primary arena for the development of the law of evidence for some time to come.

II. Legislative Developments of 1969

A. *The Informer Privilege*

As originally enacted, Evidence Code section 1042 codified the rule, previously declared by the courts, requiring a criminal prosecution to be dismissed if the name of an informer who is a material witness on the issue of guilt is concealed by the government under the informer privilege contained in Evidence Code section 1041.[1] With the exception hereinafter noted, section 1042 also required the Court to suppress evidence, strike the testimony, or make some other appropriate order if the government chose to invoke the informer privilege to conceal the name of an informant who was a material witness, not as to guilt, but on some narrower issue such as the admissibility of evidence.[2] Subdivision (c) of section 1042 provided an exception in narcotics cases permitting the government to conceal the name of a confidential informant who

1. Comment to Evid. Code § 1042.
2. Comment to Evid. Code § 1042.

was not a material witness on the issue of guilt, if the court was satisfied that the informant was a reliable informant.

In 1969, the legislature broadened the exception contained in subdivision (c) to apply in any criminal prosecution. At the same time, subdivision (d) was added to deal with the situation where the defendant contends that the confidential informant is a material witness on the issue of guilt and the prosecution contends that he is not. Subdivision (d) of section 1042, as added in 1969, provides that the Court may conduct a hearing out of the presence of the defendant and his counsel at which the name of the informant can be revealed. The purpose of this *in camera* hearing is to determine whether nondisclosure will deprive the defendant of a fair trial. If the court determines that nondisclosure will not deprive the defendant of a fair trial, the proceedings *in camera* remain secret. If the court concludes that the defendant would be deprived of a fair trial if the name of the witness is not revealed to him, the Court then may proceed as authorized in subdivision (a) to make such order as may be required to assure a fair trial to the defendant.

B. *Subpoenas: Business Records, Witnesses*

The 1969 session of the legislature also broadened the scope of sections 1560–1566 of the Evidence Code. These sections permitted a hospital records custodian, when responding to a subpoena duces tecum, to send the records with an affidavit instead of appearing personally. As revised by the legislature, these sections now grant the same privilege to the custodian of any business record. The requisite affidavit must show that the affiant is the custodian of the record, that the forwarded record is that described in the subpoena, and that such record was prepared in the ordinary course of business at or near the time of the act, condition, or event reported in the record. As under the previous version of the statute, the personal attendance of the custodian of the record may be required by a statement on the subpoena duces tecum to that effect.[3]

3. Evid. Code § 1564.

A provision similarly designed to permit response to a subpoena with the least amount of inconvenience to the witness involved was enacted as Code of Civil Procedure section 1985.1. Under this section, a witness subpoenaed by a party need not appear at the time and place specified in the subpoena if he agrees with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be specified by their agreement. Under this section, failure to appear in accordance with the agreement is punishable as a contempt.

C. *Presumptions: Blood Alcohol*

Since the Evidence Code created the prevailing system under which some presumptions affect the burden of proof and others affect the burden of producing evidence, the legislature has from time to time enacted legislation classifying presumptions for the purpose of allocating the burden of proof or of producing evidence. Probably the most significant of these enactments is that contained in section 23126 of the Vehicle Code, which was added in 1969. Under this section several presumptions affecting the burden of proof were created. In a criminal prosecution arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of intoxicating liquor, there is now a presumption affecting the burden of proof that if the person has less than .05% by weight of alcohol in his blood at the time of the test, he was not under the influence of alcohol at the time of the alleged offense. If the percentage of blood alcohol is .05% or more, but less than .10%, there is no presumption as to the influence of the intoxicating liquor. If the person is found to have .10% or more of alcohol in his blood, it is presumed that he was under the influence of intoxicating liquor.

The effect of these provisions is to be determined by sections 600–607 of the Evidence Code, which describe the effect of presumptions. Applying the Evidence Code to those provisions of Vehicle Code section 23126 relating to the effect of a finding of a blood-alcohol percentage of .10 or less, it

appears that they are without significance. Since, in a prosecution for drunk driving, the prosecution has the burden of proving that the defendant was under the influence of intoxicating liquor, a statute imposing such burden on the prosecution after proof that the defendant had a blood-alcohol percentage of .05 or less adds nothing to the burden of proof that was already imposed on the prosecution. And since prior to the enactment of the statute, there was no presumptive effect to a finding of any particular percentage of blood alcohol, it is obvious that the provision that there is no presumptive effect to a finding of blood alcohol between .05 and .10 percent does not change the law.

The significant provision of new Vehicle Code section 23126 is the one that creates a presumption that a person was under the influence of intoxicating liquor when it is proved that his blood contained .10% or more by weight of alcohol. Under this provision, the prosecution need prove on the issue of "under the influence" only that the defendant had the requisite blood-alcohol percentage. It will no longer be necessary under the statute to prove the actual influence that the alcohol had on his behavior. On proof of the requisite blood-alcohol percentage, the defendant will be required to show that he was not under the influence of alcohol. Since the presumption is applicable in criminal actions only, under Evidence Code section 607, the defendant's burden of proof requires only that the defendant raise a reasonable doubt as to whether he was under the influence of alcohol. In substantive effect, the legislature by enacting Vehicle Code section 23126 has provided that it is unlawful to drive with a blood-alcohol percentage of .10 percent or more unless the defendant can raise a doubt in the mind of the trier of fact as to whether such alcohol influenced him in his driving.

It should be noted that the statute as drafted creates a presumption as to the influence of intoxicating liquor at the time of the alleged *offense* from proof of blood-alcohol percentage at the time of the chemical *test*. The statute does not require that the test be given within a prescribed period of time after the alleged offense and it does not require proof that the de-

fendant had no access to alcohol between the time of the offense and the time of the test.

These omissions could affect the constitutionality of the statute. It has been repeatedly held that a presumption is unconstitutional if there is no rational connection between the fact proved and the fact presumed.[3.5] There is obviously no rational connection between a blood-alcohol percentage at the time of the chemical test and the influence of alcohol at the time of an offense unless the test is given within a few hours after the offense and the offender had no opportunity to ingest alcohol in the interim. Yet these essential foundational conditions are not required to be shown by the statute in order to establish the presumption. The presumption arises from the blood alcohol level at the time of the test alone.

The constitutional question could have been readily avoided if the legislature had simply based the presumption on the blood alcohol level at the time of the alleged offense. Since alcohol disappears from the blood at a constant rate, proof of the blood-alcohol percentage at the time of the offense could be provided by evidence of the chemical test, the time elapsed between the offense and the test, and the absence of opportunity to ingest alcohol in the interim. It is, therefore, somewhat surprising that the statute was drafted in the form it now appears. After all, the element of the crime involved is being under the influence of intoxicating liquor at the time of the offense, not being under the influence at the time of submission to a chemical test.

III. Judicial Developments of 1969

As in former years, the courts have continued to develop rules of evidence based on procedural guarantees of the United States Constitution. Again, the bulk of the appellate cases dealing with evidence are criminal cases. The most significant event in the period of time covered by this report is the discovery by the courts of certain new limitations that the Sixth

3.5. People v Stevenson 58 Cal. 2d 594, 26 Cal. Rptr. 297, 376 P.2d 297 (1962); People v Johnson, 258 Cal. App. 2d 705, 66 Cal. Rptr. 99 (1968).

Amendment requirement of confrontation imposes on the admissibility of hearsay evidence. There have been suggestions that the Sixth Amendment now prohibits rational development of the hearsay rule and may in fact require re-evaluation of some exceptions heretofore accepted without substantial question. Since this development, along with the trend it may foreshadow, is by far the most significant event of 1969 so far as the law of evidence is concerned, this report first turns to those cases dealing with the constitutional right of confrontation, the hearsay rule, and the relationship between the two.

A. *Confrontation and Hearsay: Witness' Prior Statement*

The leading case is *People v. Johnson,*[4] decided in 1968. In the *Johnson* case, the defendant's wife and daughter had testified before a grand jury that the defendant had committed acts of incest with the daughter. On the basis of this testimony, the defendant was indicted. He pleaded guilty, and after serving some two years and 8 months in prison, his plea was set aside by order of a federal court for lack of adequate representation by counsel. On rearraignment, the defendant pleaded not guilty and was tried. At the trial, the wife and daughter denied that the incestuous acts had occurred. The grand jury testimony was then introduced, and under Evidence Code section 1235, it was received for the truth of the matters stated. The California Supreme Court held that this use of the prior inconsistent statements was impermissible under the Sixth Amendment to the United States Constitution guaranteeing the right to confrontation in criminal cases.

In *Johnson,* of course, the defendant did confront the witnesses whose statements were introduced against him, and he did have the right to cross-examine them before the trier of fact concerning the subject matter of their statements. Nevertheless, the Court held that the use of their prior statements to prove the matters stated violated the constitutional right of

4. 68 Cal.2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968), cert. den., 393 U.S. 1051, 21 L.Ed.2d 693, 89 S.Ct. 679.

confrontation. Said the Court, that right requires the right of cross-examination *at the time* the statements are given.[5]

In 1969, further ramifications of the *Johnson* decision have developed, but the full potential of that decision has yet to be realized.

In *Johnson* itself, there was no indication that the statements involved would have been admissible if the declarants had been unavailable to testify at the time of the trial. Subsequent cases, however, have indicated that the admissibility of the statements in the absence of the declarants is not a relevant consideration in determining whether the statements can be admitted as substantive evidence. Thus, in *People v. Green*[6] the Supreme Court held that the *Johnson* rule is equally applicable to inconsistent statements made at a preliminary hearing. Thus, the fact that the defendant confronted the declarant and had the right to cross-examine both at the preliminary hearing and at the trial itself was not deemed to be an adequate vindication of the right of confrontation.

Peculiarly, the Courts have continued to hold that former testimony is admissible as substantive evidence if the declarant is unavailable as a witness at the time of trial.[7] "Peculiarly" is used to characterize these holdings because it is apparent that the declarant is not subject to cross-examination before the trier of fact. Indeed, it is a condition of admissibility that the witness be "unavailable."

Under *Green,* therefore, a witness' former testimony may not be admitted as substantive evidence if the witness is available and subject to cross-examination. However, the evidence can come in if the witness is unavailable—all in the name of protecting the defendants' right to cross-examine. In *Green,* the conviction was reversed because the witness was available at trial and subject to cross-examination. Had the

5. 68 Cal.2d 646, 654–660, 68 Cal. Rptr. 599, 604–609, 441 P.2d 111, 116–121, cert. den., 393 U.S. 1051, 21 L. Ed.2d 693, 89 S.Ct. 679.

6. 70 Cal.2d 654, 75 Cal. Rptr. 782, 451 P.2d 422 (1969); fed appeal pending.

7. People v. Peters 276 Cal. App.2d —, 80 Cal. Rptr. 648 (1969); People v. King 269 Cal. App.2d 40, 74 Cal. Rptr. 679 (1969).

witness been unavailable for cross-examination at trial, the preliminary hearing testimony would have supported the conviction.

An attempt to justify this anomalous result appears in *People v. Vinson.*[8] In *Vinson,* the Court was also concerned with the admissibility of prior testimony. In accordance with *Green, Vinson* holds that prior testimony is not admissible as substantive evidence when the witness is present and subject to cross-examination, even though the prior testimony would have been admissible as substantive evidence if the witness were unavailable at trial. Said the Court,

> It is one thing to use prior testimony . . . when the witness is dead, incompetent or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation, the hearsay is no longer reliable, and it is not the only evidence available.

This is obvious nonsense. Former testimony is former testimony. Whether it is reliable or not has nothing to do with whether the witness is now available or unavailable. That a witness has disappeared obviously does not breathe additional credibility into his former testimony. One would think that if it is constitutionally permissible to introduce as substantive evidence a statement of a person who cannot be cross-examined before the trier of fact (as in the case of any hearsay exception dependent on unavailability), it ought to be equally constitutionally permissible to introduce the same statement with the same effect when the declarant is before the trier of fact and subject to cross-examination. After all, it is the right to cross-examine the witness before the trier of fact that we are trying to protect.

8. 268 Cal. App.2d 672, 74 Cal. Rptr. 340 (1969).

9. 268 Cal. App.2d 672, 677, 74 Cal. Rptr. 340, 344.

In applying the *Johnson* rule to hearsay evidence that would have been admissible if the declarant were unavailable, the courts have failed to discern the basic scheme of the Evidence Code in establishing the "unavailability" condition. If one will scan the exceptions to the hearsay rule in the Evidence Code, he will discover that the condition of "unavailability" appears in various hearsay exceptions where the declaration involved is a narrative of past events.[10] In most instances, however, the statement is made under circumstances assuring sufficient trustworthiness that it may be admitted even though the declarant is not subject to cross-examination at trial. The presence of the declarant at trial does not make his former statement less trustworthy, and in fact his presence at trial should enhance the ability of the trier of fact to determine the truth or falsity of his former statement. Why, then, is the "unavailability" condition imposed on hearsay statements that we would be willing to receive if there were no confrontation at trial?

In these situations, the condition of "unavailability" expresses a preference for the *viva voce* narration of the witness before the present trier of fact over a previous narration of the same event. The condition of unavailability requires the proponent of the statement to call the witness if he is available, instead of relying on his hearsay narration. This, in substance, is the significance of the Comment to Evidence Code section 1230, explaining the addition of the "unavailability" condition to the exception for declarations against interest. It was not the intent of the drafters of the code that such statements should be inadmissible as substantive evidence when the witness is produced. Obviously, a declaration against interest is no less trustworthy when the witness is at the trial than it is when the witness is not. Former testimony is no less trustworthy when the witness is at the trial than it was when the witness could not be produced. But in each of these cases, the "unavailability" requirement forces the pro-

10. "Unavailability" is a condition of admissibility for declarations against interest, statements of past mental state (but not present), statements concerning the declarant's will, former testimony, statements of pedigree or relationship, and statements of boundary.

ponent to produce the witness, and the former statement is then available (with just as much reliability as it otherwise had) to present to the trier of fact if the witness in his *viva voce* testimony contradicts his prior statement.

Professor McCormick[11] has stated the rationale underlying the confrontation rule as follows:

> The production of the prosecution's witnesses at the final trial is important to the accused in three ways. First, in the light of the common law tradition, it affords an opportunity for cross examination. Second, it enables the accused to look the prisoner in the eye, which was once supposed to, and perhaps does, make a false accusation more difficult. Third, the judge or jury will see the demeanor of the witness on the stand and thus be enabled better to weigh his credibility.

Thus, the requirement of confrontation enables the trier of fact to better evaluate the truth of the statements being introduced against the defendant. The rule of confrontation enhances the ability of the trier of fact to determine such truth by requiring that the declarant appear before the trier of fact and there face cross-examination by the defendant. Under exceptions to the hearsay rule, we are willing to forgo this protection to the accused, and to permit certain statements to be admitted against him for the truth of their content, even though the accused will have no opportunity to cross-examine the declarant before the trier of fact. Under one of these exceptions (former testimony), the accused at least had a right to cross-examine on a previous occasion, but under most of them he gets no opportunity to cross-examine at all. It should be obvious that the ability of the trier of fact to evaluate the truth or falsity of these statements is enhanced, not diminished, by the appearance of the declarant at the trial and his cross-examination concerning the subject matter of the statements. Since the declarant is before the court, the accused can look the declarant in the eye, and the trier of fact

11. McCormick, *Evidence,* p. 484 (1954).

can see the demeanor of the witness on the stand. Most important, both parties have an opportunity to examine and cross-examine the witness. It seems difficult to believe, therefore, that the constitutional right of confrontation, which was designed to protect the right of cross-examination, excludes statements as substantive evidence when the witness is subject to cross-examination, but permits the statements to be used as substantive evidence when the witness is not subject to cross-examination.

In *Johnson* and *Green,* the Supreme Court declared that the constitutional right of confrontation requires *contemporaneous* cross-examination, that is, cross-examination at the time the statements are made before the trier of fact that must determine the truth or falsity of the statements. This is a newly declared principle, and at least one court has indicated substantial doubt that it is required by the Constitution. In *People v. Pierce*[12] the court said:

> The Sixth Amendment right of confrontation assures the accused an opportunity to probe the witness' accuracy. At this point the needs of effective prosecution parallel and do not collide with the interest protected by the Sixth Amendment, for the prosecution too, needs an effective forensic scalpel. The question is: On which occasion was the witness speaking the truth: when he made his prior statement or when he gave his courtroom testimony?
>
> A powerful male family figure frequently appears as the accused in intra-family sex cases. The dominance by which he imposes his sexual desires on the weaker members also permits him to close their mouths. The pressure he uses to silence the witnesses against him are fear, female sentiment and economic need. After the offense breaks out into open crisis he needs time to restore his dominance. The family's initial outburst of complaint is more likely to be reliable, their later testimony apt to be subverted by time and pressure. The

12. 269 Cal. App.2d 193, 202–203, 75 Cal. Rptr. 257, 264 (1969).

> turncoat witness is a standard syndrome of family sex offenses, one which baffles law officers and prosecutors. By rejecting present cross examination as a means of forcing the witness to explain his past declarations and his present testimony, the *Johnson* rule enlarges on the Sixth Amendment, frustrates the prosecution's ability to cope with turncoat witnesses and prevents the jury from considering evidence of probative value and probable reliability.

The *Pierce* assessment of the *Johnson-Green* rule as an enlargement of the Sixth Amendment seems accurate. Although the California Supreme Court cited a number of United States Supreme Court cases holding that a prior right to cross-examine does not satisfy the defendant's right of confrontation at trial, no case was cited (there are none) holding the right of confrontation is violated when cross-examination at trial is permitted.

The *Pierce* opinion also points out that the *Johnson-Green* rule forces the use of limiting instructions that require a jury to consider evidence for one purpose and shun it for another. As pointed out in *Pierce,* and as suggested by the Supreme Court in *People v. Aranda,*[13] few people really believe that the jury can intelligently apply such limiting instructions.

Of more concern is the question of where the doctrine of "contemporaneous cross-examination" will lead. In *Green,* it led to a holding that former testimony cannot be used as substantive evidence where the witness testifies at the trial and has, thus, been subjected to the defendant's cross-examination on the statements twice. What, then, of recorded memory? The recorded memory exception is contained in section 1237 of the Evidence Code. Under this exception, as traditionally recognized, a trial witness can testify that he correctly recorded some event that he does not remember, whereupon the authenticated record of his memory is admissible to prove the

13. 63 Cal.2d 518, 529, 47 Cal. Rptr. 353, 359–360, 407 P.2d 265, 271–272 (1965).

truth of its content. Since the memory is typically recorded out of court, there is obviously no opportunity to cross-examine at the time the original statement is made. It is true that there is an opportunity to cross-examine at the trial, but cross-examination at the trial is not contemporaneous with the statement that is being offered. Applied consistently, the *Johnson-Green* principle of contemporaneous cross-examination should require the exclusion of recorded memory. Indeed, since the witness does not remember the event recorded, cross-examination at the trial is largely fruitless. It is at least less efficacious and truth-revealing than cross-examination concerning a prior statement where the witness remembers the event. In the latter situation, the jury can observe the witness' demeanor as he explains his present and previous stories and relates what he now declares is the truth concerning the event. Where recorded memory is concerned, however, the jury never has an opportunity to observe the witness' demeanor as he relates the crucial events because, as a condition of admissibility, he does not remember them.

It was argued in *People v. Gentry*[14] that recorded memory is inadmissible under the *Johnson* rationale. *Gentry* held, however, that a right of confrontation does not prohibit the use of recorded memory in a criminal prosecution. The Court explained that the *Johnson* rule is properly limited to impeaching statements. The Court held that the *Johnson* rule should not be applied to consistent statements where the witness now vouches for the accuracy of the prior statement.

Forgetting for the moment that the witness in *Johnson* could be cross-examined concerning the events in question (because he remembered them), while the witness in *Gentry* could not be cross-examined concerning the events in question (because he did not remember them), the *Gentry* explanation is nevertheless inconsistent with the later ruling of the Supreme Court in *People v. Washington*.[15] There, the California Supreme Court held that section 1236 of the Evidence Code

14. 270 Cal. App.2d 462, 76 Cal. Rptr. 336 (1969).

15. 71 Cal.2d —, 80 Cal. Rptr. 567, 458 P.2d 479 (1969).

cannot be applied constitutionally in a criminal case to permit a prior consistent statement to be admitted as substantive evidence.

The only distinction to be perceived between *Washington* and *Gentry* is that the witness in *Washington* remembered the event in question and was, hence, subject to effective cross-examination at the trial, while the witness in *Gentry* did not remember the event in question and was not, therefore, subject to effective cross-examination. Yet, the decisions so far suggest that the recorded memory exception applied in *Gentry* is constitutional, while the consistent statement exception in *Washington* is unconstitutional because of the lack of contemporaneous cross-examination at the time of the making of the prior statement. The inconsistency in the rules is obvious, and it is impossible to predict at the present time where the "contemporaneous cross-examination" rule will lead insofar as recorded memory is concerned.

The exception for coconspirators' statements contained in Evidence Code section 1223 may also be in jeopardy under the *Johnson* rule. Since typically the coconspirator's statement (made in the course and scope of the conspiracy) is made out of court, it is obvious that there is no opportunity for cross-examination at the time the statement is made. Moreover, there is typically no opportunity for "contemporaneous cross-examination" at the trial, for the usual coconspirator cannot be forced to testify because of his privilege against self-incrimination. With no opportunity to cross-examine at either the time of the statement or the time of the trial, it may be that the *Johnson* rationale will forbid the use of coconspirators' statements as hearsay evidence in criminal prosecutions.

Indeed, since all the exceptions for vicarious admissions are based on a rationale other than the trustworthiness of the statements,[16] it may be that no vicarious admissions may be used in a criminal prosecution because of the lack of the

16. See Comment to Evid. Code § 403.

opportunity for contemporaneous cross-examination before the trier of fact.

Although the objection that hearsay is not subject to "contemporaneous cross-examination" before the ultimate trier of fact is applicable to all hearsay exceptions, it seems unlikely that the *Johnson* principle may jeopardize any other hearsay exceptions. The remaining hearsay exceptions are based on some circumstantial probability of trustworthiness, such as the fact that the statements were made without time for reflection, or business, commercial, or governmental activities have been based on the statements, or the statements have been relied on as true by parties concerned with them for long periods of time.

Vicarious admissions, however, are not admitted on the theory that they are trustworthy. The trustworthiness of recorded memory rests only in the say-so of a witness at the trial who does not remember the event. It is unlikely that former testimony is admitted because it is trustworthy. Testimony given at a trial between different parties is not admissible even though it is as trustworthy as testimony admitted under the former testimony exception. Hence, it seems more likely that former testimony is admitted under Evidence Code section 1291, simply because the defendant has already had a chance to cross-examine and, inasmuch as we cannot give him cross-examination at the trial because the witness is unavailable, the former cross-examination must suffice. Even though the former testimony may be unreliable—as, for example, if it was obtained from a convicted perjurer or from a witness who later contradicted himself—the evidence remains admissible but subject to impeachment under Evidence Code section 1202. Since the admissibility of vicarious admissions, former testimony, and recorded memory is not based on any unique trustworthiness to be attributed to the statements, the *Johnson* rationale could be carried far enough to prohibit the admission of such statements.

This writer doubts that the *Johnson* principle will be carried further. Already there are indications in the cases that there may be some reconsideration of the strength of the rule.

In *In re Hill*,[17] the Court held that it was error to admit the confession of a codefendant at the defendant's trial because of the lack of opportunity for the defendant to cross-examine the codefendant before the trier of fact at the time the confession was made. To admit the confession would violate the defendant's right of confrontation. The defendant's right of confrontation was violated, said the Court, even though the confessing codefendant took the stand and was subject to cross-examination. Nevertheless, the error was held to be nonprejudicial *because the defendant was able to cross-examine the confessing codefendant at the trial on the subject matter of the confession.* The Court stated:

> The constitutional infirmity created by the lack of cross-examination of Madorid at the time he made his confession was thus rendered harmless by petitioners' opportunity to cross-examine him at trial with respect to his testimony consistent with his confession.[18]

A similar result was reached in *People v. Washington*,[19] where a prior consistent statement was admitted for the truth of its content. The Court held that this was an error of constitutional dimension because of the lack of opportunity for the defendant to conduct a contemporaneous cross-examination before the ultimate trier of fact. Nevertheless this error was also held to be nonprejudicial because the defendant did have the opportunity to cross-examine the declarant at the trial. Said the Court:

> The prior extrajudicial statements of the witnesses were in form and substance substantially identical with the in-court testimony of the witnesses at the trial. The jury was obviously free to give the in-court testimony full substantive use if they believed it and defendant's conviction indicates that they did. Since the hearsay statements were identical with the courtroom testimony, the

17. 71 Cal.2d —, 80 Cal. Rptr. 537, 458 P.2d 449 (1969).

18. 71 Cal.2d —, —, 80 Cal. Rptr. 537, 545, 458 P.2d 449, 457.

19. 71 Cal.2d —, 80 Cal. Rptr. 567, 458 P.2d 479 (1969).

> jury could not have logically believed the former and disbelieved the latter. In short, the only value of the prior statements lay in the mere repetition of what had been said on direct examination. There was thus no 'reasonable possibility' . . . that the constitutional error contributed to defendant's conviction.[20]

The significance of these two decisions rests on the fact that the findings of "nonprejudice" are based on the same reasoning underlying the admissibility of a witness' prior statements under sections 1235, 1236, 1237, and 1238 of the Evidence Code. The real question in every case is whether a defendant is prejudiced by the introduction of an out-of-court statement when the witness is present in court and testifies in regard to the subject matter of the statement, and the defendant has a full opportunity to cross-examine concerning the statement. *Hill* and *Washington* suggest that the admission of out-of-court statements under such circumstances is nonprejudicial. It is but a small extension of these cases to state that the statements are admissible, that is, that adequate at-trial cross-examination satisfies the constitutional guarantee of confrontation.

Accordingly, it may be that the exception for recorded memory and the exceptions for vicarious admissions may be saved from the *Johnson* principle. It is difficult to see, however, how in logic the exception for recorded memory can remain immune from the *Johnson* rule so long as the Court continues to apply it with full vigor to former statements of a trial witness who is subject to full cross-examination at trial. It is to be hoped that the Court will at least modify the rule so that the "unavailability" condition will not operate to exclude prior statements by the trial witnesses, a function it was not intended to serve, but will rather operate as a sort of best evidence rule, compelling the proponent to produce testimony instead of hearsay, but leaving him free to introduce the prior statement if, despite the testimony, such evidence is

20. 71 Cal.2d —, —, 80 Cal. Rptr. 567, 576, 458 P.2d 479, 488.

needed and it meets all other conditions of an exception to the hearsay rule.

B. *Hearsay: Former Testimony*

The 1969 cases continue to emphasize that the unavailability of a witness to testify at a trial must be genuine before former testimony can be introduced. Thus, in *People v. Bailey*[1] it was held to be error to admit the preliminary hearing testimony of an out-of-state witness when the prosecution made no showing of any effort to persuade the witness to return to California, or of any effort to procure the witness' presence by the procedure allowed under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[2]

In *People v. Tedd*[3] the preliminary hearing testimony of a witness was held to be inadmissible where the prosecution showed some effort to find him within the state but such effort was so little and so late that the court concluded that it did not amount to "reasonable diligence." The investigators had failed to follow up on a number of good leads that they had discovered while looking for the witness.

In *People v. Billon*,[4] by resort to the judicial notice doctrine, the prosecution sought to avoid the application of the "unavailability" condition to the admissibility of former testimony. The charge against Billon was possession of a firearm by a felon convicted of a prior offense involving the use of a firearm. At trial, the prosecutor presented a certified copy of the defendant's 1963 conviction of assault with a deadly weapon, but produced no evidence whatever to show that this offense involved the use of a firearm. To overcome the deficiency in proof, the Attorney General asked the reviewing court to take judicial notice of the transcript of the preliminary

1. 273 Cal. App.2d —, 78 Cal. Rptr. 107 (1969).

2. See also People v. Nieto, 268 Cal. App.2d 231, 76 Cal. Rptr. 844 (1968), holding that Evid. Code § 240, requires the prosecution to resort to the Uniform Act in order to show reasonable diligence in the use of the court's process to obtain the presence of an out-of-state witness.

3. 273 Cal. App.2d —, 78 Cal. Rptr. 368 (1969).

4. 266 Cal. App.2d 537, 72 Cal. Rptr. 198 (1968).

hearing relating to the 1963 conviction. The Court refused to do so, stating that to do so would amount to a deprivation of the defendant's right to a jury trial. In essence, the prosecution was attempting to supply proof of the missing element (the use of a firearm) by testimony given at the 1963 preliminary hearing without proving the unavailability of the witness. Although the Court did not pinpoint the basis for its objection to this procedure, its conclusion was necessary to preserve the conditions required by Evidence Code section 1291, for the admissibility of former testimony.

C. *Privileges: Self-Incrimination*

The year 1969 was a significant year for California motorists. As noted above, the legislature enacted a series of presumptions relating to blood-alcohol percentages for use in prosecutions for driving while under the influence of intoxicating liquor. The California Supreme Court also contributed a significant addition to the law of evidence relating to motorists. In *Byers v. Justice Court*[5] the Court considered the relationship between the Fifth Amendment privilege against self-incrimination and the Vehicle Code sections requiring a motorist involved in an accident to stop and give his name. Byers had been involved in an accident, but he had failed to stop and identify himself. Accordingly, he was eventually charged with hit-and-run driving. Byers contended that he could not be prosecuted for failing to stop and identify himself, for his privilege against self-incrimination entitled him to refuse to do so. The Supreme Court agreed with Byers that a requirement that he stop and identify himself, when such information might lead to a criminal charge against him, would violate his Fifth Amendment privilege against self-incrimination. Therefore, to accommodate the Fifth Amendment and the policies of the statutes requiring identification, the Court judicially created an immunity for any driver who complies with the Vehicle Code sections by stopping and identifying himself. The Court said such identification evidence may not be used against

5. 71 Cal.2d —, 80 Cal. Rptr. 553, 458 P.2d 465 (1969).

the driver in any subsequent criminal prosecution. Since Byers himself could not have anticipated that he would be granted an immunity from prosecution if he had stopped, the prosecution against Byers was barred. Hereafter, therefore, a driver involved in an accident must stop and identify himself, but the prosecution must use other sources of information to identify the driver if it wishes to charge him with any crime arising from the accident.

In a comprehensive opinion relating to police interrogation, the Court in *People v. Isby*[6] set forth the distinctions between a defendant's rights under *Massiah v. United States*[7] and *Miranda v. Arizona*.[8] The Court pointed out that *Miranda* permits a custodial interrogation of an accused, without the presence of counsel, where proper advice has been given the accused concerning his rights, and the accused knowingly and intelligently waives his right to be represented by counsel and agrees to answer the questions or make a statement. *Massiah*, however, defines the rights of an accused who has been formally arraigned and is represented by counsel, whether voluntarily chosen or appointed. Under *Massiah*, no interrogation designed to elicit incriminating statements can take place in the absence of the defendant's counsel. Applying this distinction to the facts involved in *People v. Isby*, the Court concluded that the incriminatory statements elicited from Isby during interrogation after the appointment of counsel were inadmissible. It did not matter that the defendant had been given the *Miranda* advice and warnings and had thereafter consented to the interrogation. Following the appointment or procurement of counsel, said the Court, any interrogation in the absence of *that* counsel is constitutionally impermissible under the standards set forth in *Massiah*.

There continue to be cases involving application of Miranda standards and repeated attempts by defense counsel to apply those standards to nontestimonial evidence obtained

6. 267 Cal. App.2d 484, 73 Cal. Rptr. 294 (1968).

7. 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964).

8. 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966).

from the defendant. So far, such efforts have proved fruitless. Thus, in *People v. Walker*,[9] the Court held that *Miranda* does not require that a suspect be informed that his refusal to submit to a blood test may be used against him. Moreover, there is no requirement that the defendant be provided with counsel or an opportunity to obtain counsel before the administration of a blood-alcohol or other sobriety test.

In *Rust v. Department of Motor Vehicles*[10] it was successfully contended that an officer who stopped a motorist suspected of driving while intoxicated confused the driver with the *Miranda* warning. The Court held that the warning given the motorist did not make sufficiently clear that the motorist's right to an attorney was a right to have the attorney present only during questioning, not during the administration of sobriety tests. Since the officer did not qualify his warning to the motorist concerning the right to counsel, the Court held that the motorist's refusal to submit to a test in the absence of counsel was not a violation of the Vehicle Code requirement that motorists submit to such tests. Later efforts by motorists to claim confusion on the basis of the *Miranda* warning have not proved as successful as the claim made in *Rust*.[11]

In *People v. Stroud*[12] the Court discussed the burden of proof that must be met by the prosecution to satisfy a judge as to the admissibility of a confession. The Evidence Code is silent on the question, and there was no case authority in California to guide the Court. The Court concluded that the prosecution must establish the conditions for the admissibility of a confession beyond a reasonable doubt. If the trial judge has a reasonable doubt concerning the admissibility of a confession, he should exclude the statement.

D. *Privileges: Husband and Wife*

Under former law, a married person could not testify for or against the other spouse without the consent of both. Under

9. 266 Cal. App.2d 562, 72 Cal. Rptr. 224 (1968).

10. 267 Cal. App.2d 545, 73 Cal. Rptr. 366 (1969).

11. See Lacy v. Orr, 276 Cal. App. 2d —, 81 Cal. Rptr. 276 (1969).

12. 273 Cal. App.2d —, 78 Cal. Rptr. 270 (1969).

Evidence Code section 970, the privilege is taken away from the party-spouse and given to the witness-spouse. The privilege is also restricted to a privilege not to testify against the other spouse.[13] In *People v. Bradford,*[14] the Supreme Court held that the application of Evidence Code section 970, in a trial for a crime committed before the effective date of the Evidence Code, was not the application of an ex post facto law.

Bradford is of somewhat transitory significance, for there will be few crimes committed before the effective date of the Code that come to trial hereafter. A ramification of the shift of the privilege that is of more permanent significance was pointed out by the Court in *People v. Coleman.*[15] The prosecuting attorney in *Coleman* commented on the failure of the defendant's wife to testify in his behalf. The defendant asserted that this was error, citing *People v. Wilkes,*[16] which was decided before the enactment of the Evidence Code. The Supreme Court recognized that, prior to the enactment of the Code, it was improper to comment on the failure of the defendant's spouse to testify.

Because, under former law, the privilege was that of both spouses, the party-spouse could not compel the witness-spouse to testify for or against him. Under the Evidence Code, a spouse has no privilege not to testify for the other spouse. Therefore, said the Court:

> Comment on a wife's failure to testify for her defendant-husband does not . . . constitute comment on the exercise of a privilege that defendant has . . . or on his failure to call a witness that he cannot compel to testify on his behalf. Since defendant's failure to call his wife was a failure to call a material and important witness, his not doing so could be considered by the jury and commented upon by the prosecuting attorney.[17]

13. See People v. Bradford 70 Cal. 2d 333, 74 Cal. Rptr. 726, 450 P2d 46 (1969).

14. 70 Cal.2d 333, 74 Cal. Rptr. 726, 450 P.2d 46.

15. 71 Cal.2d —, 80 Cal. Rptr. 920, 459 P.2d 248 (1969).

16. 44 Cal.2d 679, 284 P.2d 481 (1955).

17. 71 Cal.2d —, —, 80 Cal. Rptr. 920, 925, 459 P.2d 248, 253 (1969).

Thus, under *Coleman,* a prosecutor may comment on a defendant's failure to produce a spouse as a witness whenever it appears that the spouse has knowledge of facts material to the prosecution.

E. *Opinion Testimony*

Several appellate decisions during 1969 involved the propriety of, and limitations on, opinion expert testimony. In *People v. Zismer,*[18] the Court held that a footprint cannot be introduced in evidence without opinion testimony connecting the footprint with the foot of the defendant. There must be some foundational opinion evidence pointing out the similarity in the prints. The Court rejected the suggestion that the jury can evaluate the alleged similarity of prints for itself.

In *State of California ex rel. Department of Public Works v. Wherity,*[19] the Court held that it was error for the trial court, in a condemnation proceeding, to exclude the testimony of an expert as to the highest and best use of the property in question. The expert was offered for the purpose of testifying on highest and best use only, not the value of the property.

In *People v. King,*[20] the Court rejected an expert's opinion identifying the defendant by a voiceprint. The Court held that voiceprint identification is not sufficiently developed to permit opinions based thereon to be admitted in court.

F. *Search and Seizure*

The major development in the law of search and seizure during 1969 was the rule announced by the United States Supreme Court in *Chimel v. California.*[1] Chimel was arrested in his home pursuant to a warrant. After serving the warrant, the officers asked for permission to look around, and when Chimel objected he was advised that on the basis of the arrest the officers would conduct the search anyway. The officers

18. 275 Cal. App.2d —, 80 Cal. Rptr. 184 (1969).

19. 275 Cal. App.2d —, 79 Cal. Rptr. 591 (1969).

20. 266 Cal. App.2d 437, 72 Cal. Rptr. 478 (1968).

1. 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969).

searched the house for about an hour and seized certain evidence that was later used against Chimel in a burglary prosecution. The United States Supreme Court held that a search incident to a valid arrest must be limited to a search of the person arrested. The purpose of the search must be to remove any weapons that might be used to resist arrest or effect an escape, and must be limited to the area into which the arrestee might reach in order to grab a weapon or evidentiary items. The search, therefore, must be confined to the arrestee's person and the area within his immediate control. If the search is to go further, the officers must obtain a search warrant. The arrest itself will not justify a search of the entire residence in which the arrest is made.

G. *Writings To Refresh Recollection*

Evidence Code section 771, provides that if a witness uses a writing to refresh his memory with respect to any matter about which he testifies, the writing must be produced at the request of an adverse party and, unless the writing is so produced, the testimony of the witness shall be stricken. Under this section, it does not matter whether the refreshing of the recollection was done at the hearing or prior thereto. Under subdivision (c) of section 771, production of the writing is excused if the writing is not in the possession or control of the witness or the party who produced his testimony and was not reasonably procurable by such party.

In *Kerns Construction Co. v. Superior Court*[2] the deposition of an employee of a party was taken by an adverse party. During the taking of the deposition, the employee refreshed his recollection by referring to reports that he had prepared in connection with his investigation of the accident that gave rise to the lawsuit. The party taking the deposition demanded the production of the reports. The employer from whom they were demanded asserted that the reports were privileged. The Court overruled this contention and held that the party taking the deposition was entitled to compel production of the

2. 266 Cal. App.2d 405, 72 Cal. Rptr. 74 (1968).

reports. The Court held that the reports were privileged under the attorney-client privilege, but when the employer furnished the reports to the employee for the purpose of refreshing his recollection, the privilege was waived. Although the adverse party took the deposition and thus compelled the employee to testify, the employer was under no obligation to provide the reports to the employee for purposes of his testimony. Having done so voluntarily, it waived its privilege and the adverse party could compel production of the reports used to refresh recollection.

IV. Conclusion

The movement for evidence reform that resulted in the enactment of the Evidence Code began because there was almost uniform dissatisfaction with the state of the existing law. So far as hearsay is concerned, conditions of admissibility varied from exception to exception without apparent reason. The scope of various privileges and the conditions of waiver varied with a similar lack of apparent reason.[3] Accordingly, the Law Revision Commission sought to identify the policies underlying the various evidentiary rules and then to apply those policies consistently to similar situations in order to avoid the anomalies and inconsistencies that existed under prior law. As the cases come before the reviewing courts, the anomalies and inconsistencies have again begun to appear. Indeed, as the California Supreme Court has started to imbed the former limitations of the hearsay rule into the Constitution, it has begun to make statements lauding the hearsay exceptions that the Commission and the prior commentators had found so inconsistent and unsatisfactory.[4] Thus, for some forms of hearsay (any hearsay admissible on a showing of unavailability), we find that to guarantee the right of cross-

3. See generally, 7 California Law Revision Commission, *Reports, Recommendations and Studies,* pp. 29–37.

4. See People v. Washington, 71 Cal. 2d —, —, 80 Cal. Rptr. 567, 574–575, 458 P.2d 479, 486–487 (1969):

"The use as substantive evidence of prior consistent statements is not one of the traditional hearsay exceptions developed over a long period of time and given recognition in countless decisions of English and American courts."

examination, the courts exclude the evidence when, at trial, cross-examination is provided and admit the evidence when it is not provided. It is hoped that this development noted in the cases this past year is not in fact a trend. It is also hoped that the Court will not consider evidence rules constitutionally sanctified merely because they are old. Too much reverence for the evidence rules developed "over a long period of time in countless decisions of English and American courts"[5] would merely stifle the reforms found to be so necessary.

5. People v. Washington, 71 Cal.2d —, —, 80 Cal. Rptr. 567, 574–575, 458 P.2d 479, 486–487 (1969).